IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition No. 3545 of 2005

Ashwini Ashok Desai ..Petitioner

vs.

Chattrapati Shivaji Maharaj
General Hospital ..Respondents

Shri A.P.Parlikar for petitioner.
Shri V.P.Malvankar, A.G.P. for respondents.

CORAM:A.P.SHAH and Dr.D.Y.CHANDRACHUD JJ.

5th August, 2005

ORAL JUDGEMENT (Per A.P.Shah J.):

. Rule. The learned A.G.P. appearing for respondents waives service. By consent, rule is made returnable forthwith.

2. The petitioner was working in Govt. General Hospital at Solapur as Staff Nurse with effect from 16th August, 1980. In or about October, 1999 the petitioner developed mental illness i.e Schizophrenia and was under medication. The Medical Officer of the General Hospital certified that the petitioner was suffering from chronic Schizophrenia. On the basis of the report made by the Standing Medical Board the petitioner was made

to retire from service on the ground of mental illness on 4th January, 2003.

3. The petitioner filed a Complaint with the Commissioner for the Welfare of Persons with Disability, Pune for violation of her right as a person with disability and in particular section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, hereinafter referred to as the "Act". It appears that the Commissioner directed Sasoon Hospital, Pune to assess percentage of disability of the petitioner and accordingly Sasoon Hospital has reported that the degree of disability is between 40% to 70% as per IDEAS. The report further mentions that considering the chronicity of illness, irregularity in treatment and moderate degree of disability the petitioner is unfit to work as a Staff Nurse. To the same effect is the report of the K.E.M.Hospital, Pune which is annexed at Exh.F to the petition.

4. The Commissioner after hearing the parties by his order dated 10th February, 2005 rejected the Complaint of the petitioner. The Commissioner in his order noted that section 47 of the Act mentions that if a person acquires disability during service

then he cannot be removed from service, but proceeded to hold that since no reservation is prescribed for persons suffering from mental illness under sec.33 of the Act, the persons suffering from disability of mental illness cannot be given benefit under sec.47.

5. Shri Parlikar, learned Counsel appearing for the petitioner submitted that the petitioner is covered by the definition of person with disability as defined by the Act and in view of the mandatory provisions of section 47 of the Act, the petitioner's services cannot be terminated and she ought to have been given alternate job and if alternate job was not available it was obligatory on the part of the authorities to create supernumerary post for the petitioner. Learned Counsel submitted that section 47 is an independent provision and is not controlled by section 33 which deals with reservation for persons with disability in Government service. Shri Malvankar, learned A.G.P. on the other hand, submitted that the petitioner is not fit for the post of the Midwife and, therefore, she has been retired from service on medical ground and has been given full pensionary benefits. Therefore, no interference is warranted with the order of the Commissioner.

6. For proper appreciation of the rival submissions of the learned counsel for the parties, it is useful and necessary to notice a few definitions as contained in sections 2 and 47 of the Act:

> "2 Definitions:- In this Act, unless the context otherwise requires:-
>
> (i) ‘disability’ means-
>
> (i) - (vi)
>
> (vii) mental illness;
>
> (k) ‘establishment’ means a corporation established by or under a Central, Provincial or State Act, or an authority or a body owned or controlled or aided by the Government or a local authority or a government company as defined in Section 6l7 of the Companies Act, l956(I of l956) and includes departments of a Government;
>
> (t) ‘person with disability’ means a person suffering from not less than forty per cent

of any disability as certified by a medical authority;

(w)‘rehabilitation’ refers to a process aimed at enabling persons with disabilities to reach and maintain their optimal physical,sensory, intellectual, psychiatric or social functional levels".

7. Section 47 of the Act which is material for the purpose of this petition reads as follows:

"47. Non discrimination in Government Employment: - (1) No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service:

Provided that, if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits.

Provided further that it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a

suitable post is available or he attains the age of superannuation, whichever is earlier.

(2) No promotion shall be denied to a person merely on the ground of his disability;

Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section."

8. According to the learned counsel for the petitioner, petitioner's disability falls under section 2(i)(vii), namely mental disability. There is no dispute that the Act applies to the establishment of the respondents and this establishment is not exempted under any notification under section 47 of the Act. "Persons with disability" means a person suffering from not less than 40% of any disability as certified by a medical authority as per the definition given under section 2(t).

9. From the facts, which are not in dispute, it is

clear that the disability suffered by the petitioner is covered by section 2(i)(vii) read with section 2(t) of the Act. It is also not in dispute that this disability was acquired by the petitioner during her service. We may also notice some provisions in Chapter VI of the Act relating to employment. Section 32 provides for identification of posts which can be reserved for persons with disabilities. Section 33 speaks of reservation of such percentage of vacancies not less than 3% for persons or class of persons with disability of which l% each shall be reserved for persons suffering from (i) blindness or low vision; (ii) hearing impairment; and (iii) locomotor disability or cerebral palsy. Section 38 requires the appropriate Governments and local authorities to formulate schemes for ensuring employment of persons with disabilities. Section 47 is included in Chapter VIII of the Act. Chapter VI deals with employment relating to persons with disabilities including identification of posts and reservation of vacancies for such persons. Under this Chapter, reservation of vacancies for persons with disabilities is made for initial appointments. Section 47 in Chapter VIII deals with an employee of an establishment who acquires a disability during his service.

l0. In Kunal Singh Vs. Union of India; (2003) 4 SCC 524, the Supreme Court held that section 47 casts a statutory duty on the employer to accommodate those employees who acquire a disability while in their employment, in alternate posts or to create a supernumerary post till a suitable post is available. The obervations made by the Court in paras 9 and l0 are material and read as under:

> "9.Chapter VI of the Act deals with employment relating to persons with disabilities, who are yet to secure employment. Section 47, which falls in Chapter VIII, deals with an employee, who is already in service and acquires a disability during his service. It must be borne in mind that section 2 of the Act has given distinct and different definitions of "disability" and "person with disability". It is well settled that in the same enactment if two distinct definitions are given defining a word/expression, they must be understood accordingly in terms of the definition. It must be remembered that a person does not acquire or suffer disability

by choice. An employee, who acquires disability during his service,is sought to be protected under section 47 of the Act specifically. Such employee, acquiring disability, if not protected, would not only suffer himself, but possibly all those who depend on him would also suffer. The very frame and contents of section 47 clearly indicate its mandatory nature. The very opening part of the section reads "no establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service". The section further provides that if an employee after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits; if it is not possible to adjust the employee against any post he will be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier. Added to this no promotion shall be denied to a person merely on the ground of is disability as is evident from sub-section (2) of section 47. Section 47 contains a clear directive that the employer shall not

dispense with or reduce in rank an employee who acquires a disability during the service. In construing a provision of a social beneficial enactment that too dealing with disabled persons intended to give them equal opportunities, protection of rights and full participation, the view that advances the object of the Act and serves its purpose must be preferred to the one which obstructs the object and paralyses the purpose of the Act. Language of section 47 is plain and certain casting statutory obligation on the employer to protect an employee acquiring disability during service.

l0. The argument of the learned counsel for the respondent on the basis of the definition given in section 2(t) of the Act that benefit of section 47 is not available to the appellant as he has suffered permanent invalidity cannot be accepted . because,the appellant was an employee, who has acquired "disability" within the meaning of section 2(i) of the Act and not a person with disability".

ll. Section 47 of the Act incorporates the principle of reasonable accommodation which provides for various measures to prevent discrimination against the disabled persons employed in establishments covered by the Act. Provisions of section 47 are in addition to the provisions relating to employment rights of persons with disabilities and lays down a salutary rule that an employee acquiring disability during the employment shall not be terminated or reduced in rank. The mandate of section 47 is clear that an employee who has suffered disability during the employment is entitled to protection of that section. Therefore, in our opinion the Commissioner committed a serious error in holding that the benefits of section 47 are available only to categories of disabilities mentioned in section 33. Section 33 mandates the Government to make reservations in jobs and is an independent provision apart from the protection which has been afforded to the employees who acquire disability during employment. Merely because the petitioner got invalidity pension is no ground to deny protection mandatorily made available to the petitioner under section 47 of the Act. Once it is held that the petitioner has acquired disability

during her service and if found not suitable for the post she was holding , she can be shifted to some other post with same payscale and service benefits; if it is not possible to adjust her against any post, she can be kept on a supernumerary post until a suitable post is available or she attains the age of superannuation whichever is earlier.

12. In the result, the order of the Commissioner as well as the order terminating the service of the petitioner are quashed and set aside. The respondents are directed to identify a suitable post for the petitioner and in case no suitable post is available create a supernumerary post for the petitioner in accordance with section 47. The respondents are also directed to forthwith release the salary of the Petitioner for the period from 4th January, 2003 and continue to pay her salary as per section 47 of the Act. As the petitioner’s family is at Pune the petitioner may be transferred to Pune as per Govt. Circular dated 15th December, 2004 Rule is made absolute accordingly with no costs.